

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC MCNATT,

Plaintiff,

v.

RICHARD PRINCE, BLUM & POE, LLC,
AND BLUM & POE NEW YORK, LLC,

Defendants.

Case No. 1:16-cv-08896-SHS

JOINT PRETRIAL ORDER

The parties having conferred among themselves and with the Court pursuant to Fed. R. Civ. P. 16, the following statements, directions and agreements are adopted as the Pretrial Order herein.

I. FULL CAPTION

Eric McNatt v. Richard Prince, Blum & Poe, LLC, and Blum & Poe New York, LLC, No. 16-cv-08896-SHS.

II. NAMES AND CONTACT INFORMATION FOR ALL TRIAL COUNSEL

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**Defendants Blum & Poe, LLC and
Blum & Poe New York, LLC's Counsel**

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III. JURISDICTIONAL STATEMENT

Eric McNatt ("Plaintiff"), Blum & Poe, LLC, Blum & Poe New York, LLC (collectively, "Blum & Poe") and Richard Prince (together with Blum & Poe, "Defendants") agree that this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

IV. BRIEF SUMMARY OF CLAIMS AND DEFENSES

A. Plaintiff's Summary of Claims to be Tried

Plaintiff Eric McNatt is a commercial, editorial and fine art photographer who authored the work *Kim Gordon 1*. McNatt has a United States registration of copyright in *Kim Gordon 1* with an effective date of September 12, 2014. McNatt's claims to be tried are that

Defendants willfully infringed his exclusive rights as the copyright owner of *Kim Gordon 1* by:

(1) Prince's unauthorized reproduction, display and distribution of *Kim Gordon 1* in Prince's Instagram post that later became *Portrait of Kim Gordon*, (2) Prince's unauthorized reproduction, display and distribution of *Kim Gordon 1* in Prince's work *Portrait of Kim Gordon*, and unauthorized preparing of a derivative work based upon *Kim Gordon 1*, (3) Blum & Poe's unauthorized display and distribution of *Kim Gordon 1* as copied in *Portrait of Kim Gordon*, and creation, display and distribution of advertising material featuring *Kim Gordon 1* as copied in *Portrait of Kim Gordon*, (4) Blum & Poe's knowledge of and material contribution to, or financial interest in and supervisory ability over, Prince's unauthorized reproduction, display or distribution of *Kim Gordon 1* as copied in *Portrait of Kim Gordon* by promoting and controlling the exhibition of the work in their Tokyo gallery and facilitating the sale of the work and (5) Blum & Poe's unauthorized reproduction, display and distribution of *Kim Gordon 1* by creating, displaying and selling copies of a gallery book featuring Prince's *New Portraits* series, including *Portrait of Kim Gordon*.

On these claims, McNatt seeks the following relief: (1) a finding that each Defendant has infringed McNatt's exclusive rights in *Kim Gordon 1*, pursuant to 17 U.S.C. § 106; (2) declaratory relief declaring that Prince's use of *Kim Gordon 1* is not a fair use protectable under 17 U.S.C. § 107, pursuant to 28 U.S.C. §§ 2201-02; (3) injunctive relief enjoining each Defendant from reproducing, modifying, preparing derivative works from, displaying or selling, offering to sell, or otherwise distributing *Kim Gordon 1*, the Instagram post, *Portrait of Kim Gordon*, the gallery book or any other infringing articles, including any copies of the foregoing existing in any form, pursuant to 17 U.S.C. § 502; (4) seizure and forfeiture to McNatt, or other disposition as the Court deems appropriate, of *Portrait of Kim*

Gordon, and ordering the destruction, or other disposition as the Court deems appropriate, of the Instagram post, the gallery book and any other infringing articles, including all copies of any of the foregoing existing in any form in the possession or under the control of any Defendant, pursuant to 17 U.S.C. § 503; (5) statutory damages in the maximum amount allowed by law, or, alternatively at McNatt's election, actual damages suffered by McNatt and profits or other advantages derived by Defendants arising out of or related to copyright infringement of *Kim Gordon I*, pursuant to 17 U.S.C. § 504, in amounts to be proven; (6) attorneys' fees and costs pursuant to 17 U.S.C. § 505; and (7) such other further relief as the Court deems proper and just.

B. Plaintiff's Summary of Claims/Defenses Previously Asserted Which Are Not to Be Tried

In McNatt's Complaint (Dkt. 1), McNatt asserted a claim for copyright infringement against Prince and Blum & Poe for their unauthorized reproduction, display and distribution of *Kim Gordon I* by creating, displaying and selling copies of a gallery book featuring Prince's *New Portraits* series, including *Portrait of Kim Gordon*. At trial, McNatt will only assert that claim against Blum & Poe and not against Prince.

C. Defendants' Summary of Defenses to be Tried

Defendants deny the claim of copyright infringement.

Defendants' defenses to be tried are that Plaintiff cannot meet his burden of proving the elements necessary to establish his claims or satisfying the requirements for any of the relief he is seeking. In addition, Defendants' affirmative defenses to be tried include their First Defense, Second Defense, Third Defense, Fourth Defense, Fifth Defense (except as otherwise noted below), Sixth Defense, Seventh Defense, Ninth Defense, and Tenth Defense, as set forth in Defendants' Amended Answer (Dkt. 97).

D. Defendants' Summary of Defenses Previously Asserted Which Are Not to be Tried

In Defendants' Amended Answer (Dkt. 97), Defendants asserted the affirmative defenses of laches, waiver, unjust enrichment, and *de minimis* use. At trial, Defendants will not pursue these affirmative defenses.

V. STATEMENT REGARDING TRIAL FORM AND LENGTH

Plaintiff agrees to a trial by the Court; Defendants do not and demand a trial by jury. Plaintiff anticipates that he will need three (3) full days for his case in chief; Defendants anticipate that it will take five (5) days to present their case.

VI. STATEMENT REGARDING MAGISTRATE JURISDICTION

The parties have not consented to trial of the case by a magistrate judge.

VII. STIPULATIONS OF FACTS AND RELEVANT LAW

The following facts are deemed admitted at trial.

1. On July 25, 2014, Plaintiff Eric McNatt photographed Kim Gordon for an interview of Gordon slated to appear in *Paper* Magazine.

2. *Paper* ultimately chose an image of Kim Gordon from the July 2014 photo shoot, which was first published in print, online, and on the magazine's Instagram account on September 9, 2014.

3. In or around 2014, Prince created his *New Portraits* series of artworks.

4. Between April 3, 2015 and May 30, 2015, defendant Blum & Poe exhibited twenty-six of Prince's *New Portrait* works in its Tokyo gallery (the "Exhibition"), including Prince's *New Portrait* of Kim Gordon.

5. Each of the twenty-six works in the Exhibition were list-priced at \$90,000.

6. All twenty-six artworks in the Exhibition were purchased.

VIII. LIST OF WITNESSES AND WHETHER THEY WILL TESTIFY LIVE OR BY DEPOSITION

A. Plaintiff's Witnesses

Depending on the defenses asserted by Defendants, Plaintiff intends to call the following witnesses at trial. Plaintiff reserves the right to call live each witness listed as "deposition only" pending any Court order limiting the scope of Plaintiff's deposition designations set forth in Attachment A. Witnesses marked with an asterisk (*) are expert witnesses whose opinions Plaintiff intends to offer at trial.

1. Eric McNatt (Live)
2. Richard Prince (Live and by deposition)
3. Jeff Poe (Live and by deposition)
4. Betsy Biscone (Deposition only)
5. Eric Brown (Deposition only)
6. Matt Gaughan (Deposition only)
7. Jane Harmon (Deposition only)
8. Stephen Holzen* (Live)
9. Michelle Bogre* (Live)
10. Nate Harrison* (Live)
11. Amy Whitaker* (Live)

Plaintiff objects insofar as Defendants seek to offer Defendants' own deposition testimony absent a showing of unavailability under Federal Rule of Civil Procedure 32(a)(4). Plaintiff further reserves the right to use any of its affirmative designations for such testimony as counter-designations, or vice versa, depending on the presentation at trial.

B. Defendants' Witnesses

Defendants respectfully submit the following list of witnesses who they may call to testify at trial. Defendants reserve the right to supplement and/or amend this list, and to call live or by videotaped deposition any of the witnesses listed below. Defendants also reserve the

right to call at trial any witness listed on Plaintiff's witness list. Defendants further reserve the right to call any witnesses necessary for impeachment or rebuttal.

The final list of witnesses Defendants ultimately present at trial is dependent on a number of factors, including without limitation: (a) the outcome of any pending or subsequent motions; (b) the witnesses and evidence Plaintiff presents during his case-in-chief; and (c) the overall trial schedule and availability of Defendants' witnesses. Subject to those considerations, and without waiving their right to call additional witnesses who are not identified on the list below, Defendants may present the following witnesses at trial:

1. Eric McNatt (Live)
2. Alexander DiPersia (Live)
3. Kim Gordon (Live)
4. Richard Prince (Deposition only)
5. Jeff Poe (Live)
6. Matthew Bangser (Live)
7. Mia Romanik (Live)
8. Allan Schwartzman (Live)
9. Brian Wallis (Live)
10. Alice Marwick (Live)
11. Christian Tregillis (Live)

In addition, with respect to Plaintiff's witness list, Defendants object to Plaintiff's designation of Mr. Poe's deposition testimony. Pursuant to Rule 3(A)(viii) of this Court's Individual Practices, each party is required to identify "witnesses whose testimony is to be offered in its case in chief, indicating whether such witnesses will testify in person or by deposition." (emphasis added). Here, Defendants have advised Plaintiff that Mr. Poe will appear live at trial. Because Mr. Poe will be available to testify in person, including during Plaintiff's case in chief if Plaintiff elects to call Mr. Poe, Plaintiff may not also call him by deposition. Given this objection, Defendants have not served page-and-line-specific objections or offered counter-designations to the testimony that Plaintiff designated for Mr. Poe. In the event the Court permits Plaintiff to play Mr. Poe's deposition designations at trial, notwithstanding that

he will testify live, Defendants reserve the right to make specific objections and counter-designate testimony.

IX. LIST OF DEPOSITION DESIGNATIONS

Plaintiff intends to designate deposition testimony for use at trial as set forth in Attachment A. Defendants intend to designate deposition testimony for use at trial as set forth in Attachment B.

X. EXHIBITS

Plaintiff intends to offer the exhibits listed in Attachment C. Defendants intend to offer the exhibits listed in Attachment D.

Dated: New York, New York
December 30, 2023

For Plaintiff:

/s/ Christopher P. Davis

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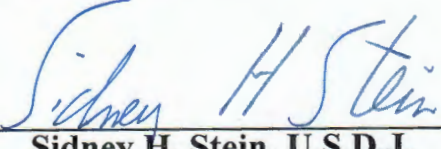
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*Counsel for Richard Prince, Blum &
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Dated: New York, New York
January 4, 2024

SO ORDERED:



Sidney H. Stein, U.S.D.J.